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No. 84-1942

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

HENRY GERRARD CLAY,

Respondent.

REPLY BRIEF

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REPLY BRIEF

I DISQUALIFICATION QUESTION

Respondent's assertion that "Justice Embry can gain no pecuniary benefit from the result in this litigation," Response p. 12, is contradicted by the fact that, at the very least, the settlement value of Justice Embry's bad faith case against Blue Cross-Blue Shield has been greatly enhanced by the Alabama Supreme Court's ruling in this case as well as *Aetna Life Ins. Co. v. Lavoie*, — So.2d —, 19 A.B.R. 272 (Ala. Dec. 8, 1984), *appeal docketed*, 53 U.S.L.W. 3759, *probable jurisdiction noted*, 53 U.S.L.W. 3843 (May 28, 1985) (No. 84-1601) [hereinafter *Aetna v. Lavoie*]. The previous high water mark for bad faith punitive damages in Alabama was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 926 (Ala. 1981). The $3.5 million and $1.25 million punitive damage verdicts affirmed in *Aetna v. Lavoie* and the present case, respectively, put Justice Embry's claim in the 'million dollar plus' potential verdict range.[1]

Justice Embry's interest is described by Respondent as a "bare expectation." Response p. 11. It is not denied that his interest became a great expectation after the decisions in which Justice Embry participated. His expectation was

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[1] The facts of Justice Embry's bad faith lawsuit against Blue Cross-Blue Shield were discussed in Justice Embry's deposition taken January 10, 1985. A transcript of that deposition is already on record in this court in *Aetna v. Lavoie*. See Jurisdictional Statement of Aetna Life Ins. Co., App. p. 145a. A copy of Justice Embry's complaint in that case is included in Nationwide's petition, App. C. p. 46a.

as proximate as those of the judges involved in *State of California v. Kleppe*, 431 F.Supp. 1344 (C.D. Cal. 1977), and *In re Honolulu Consolidated Oil Co.*, 243 F. 348 (9th Cir. 1917), both of which concerned judges who owned an interest in non-party corporations whose fortunes could be affected by the outcome of the cases in which they sat. In *Honolulu Consolidated, supra*, the "suggested disqualification was that where the sitting judge has a lawsuit, or is a stockholder of a corporation having a lawsuit, pending or impending with another person . . . which rests upon a like statement of facts or upon the same point of law as that pending before him, it is a sufficient ground of disqualification." 243 F. at 350. The holding in *Honolulu Consolidated* is in accord with this Court's pronouncement in *Tumey v. Ohio*, 273 U.S. 510 (1927), that a decision should be set aside where there is the "slightest pecuniary interest" on the part of the judge. *Id.* at 524. *See also, Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

Justice Embry's disqualification was not a "discretionary matter" simply involving his personal views about the "subject matter of bad faith," as Respondent says. Response pp. 8, 9, 12.[2] Under recognized standards of

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[2] Respondent's reliance upon *Laird v. Tatum*, 409 U.S. 824 (1972); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975); and *Hartman v. Board of Trustees*, 436 So.2d 837 (Ala. 1983), none of which involved a pecuniary interest in the subject matter in controversy, is misplaced. The case at bar involves a pecuniary interest, albeit indirect, similar to *Gibson v. Berryhill*, 411 U.S. 564 (1973), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927). Respondent failed to distinguish any of those cases.

the Code of Judicial Conduct, Justice Embry's interest required a *mandatory* disqualification. Canon 3C(1)(c) of the Code of Judicial Conduct provides that a judge "shall" disqualify himself when he has a "financial interest in the *subject matter* in controversy," even if he has no interest in either party bound by its outcome. (emphasis added) *See* Advisory Committee on Codes of Conduct, Advisory Opinion No. 63, Code of Judicial Conduct for United States Judges (1981). Canon 3C(1)(c) further states that "*any other interest* that could be substantially affected by the outcome" is a mandatory disqualifying interest.[3] (emphasis added) These standards give specific meaning to the Constitutional right to an impartial tribunal established in *Tumey v. Ohio, supra.*

Respondent argues that the disqualification of Justice Embry would not have affected the outcome of the 6-3 decision in this case. Response pp. 8, 17. That assertion is unrealistic in view of the collegial nature of the decision-making process of an appellate court. *See* Petition pp. 12-13. Furthermore, upon Justice Embry's failure to recuse himself, it was the Constitutional duty of the Supreme Court of Alabama as a body to require his recusal to protect Nationwide's due process right to a fair and disinterested appellate hearing. Justice Embry's non-recusal was the court's error as well as his. *See Petition* pp. 12-13.

Respondent also suggests that Nationwide should, at some earlier point, have known of Justice Embry's per-

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[3] See C. Wright, A Miller & E. Cooper, Federal Practice and Procedure, § 3546 at 602 (1984), stating that an indirect financial interest is treated as an "other interest" within the meaning of Canon 3C(1) (c).

sonal bad faith actions and raised the disqualification question sooner. Response p. 5 n.6. However, no explanation is given as to how Nationwide should have discovered this information. Respondent's statement that Justice Embry's lawsuit was a public record in Birmingham, Alabama, some 250 miles away, implies that Nationwide had a duty to inquire in all the courts in Alabama whether any of the justices had individually filed similar bad faith actions. To the contrary, it was Justice Embry's duty to make the information known to the parties. *See* Code of Judicial Conduct Canon 3D. The Advisory Committee on Codes of Conduct has stated that the judge himself "should disclose to the parties the facts bearing on disqualification as soon as those facts are learned, even though they may be after entry of the decision." Advisory Committee on Codes of Conduct, Opinion No. 71, Code of Judicial Conduct for United States Judges (Dec. 14, 1981).

II OTHER CONSTITUTIONAL QUESTIONS

In regard to the other Constitutional questions raised by Nationwide, Respondent argues, as anticipated in Nationwide's petition, that those questions were not adequately raised in the state court. Respondent acknowledges that Nationwide's Constitutional challenge to the judgment under the Ex Post Facto Clause[4] was raised

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[4] With respect to Nationwide's argument that Alabama's subsequent recognition of the tort of bad faith violated its right to fair warning of punishable conduct, Respondent attempts to argue that Nationwide's claims review actually extended beyond his filing suit in 1978. That argument ignores the practical realities of the situation since the process of claims

(Continued on following page)

below in Nationwide's application for rehearing. Response p. 15. There are many cases, however, in which the Alabama court has considered such questions first raised on rehearing.[5] Respondent fails to suggest any prudential reasons why Nationwide's Constitutional challenge to the judgment, once asserted on application for rehearing, should not be reviewed by this Court. *See* Petition pp. 7-9. With respect to Nationwide's contentions based on the Due Process, Excessive Fine and Contract Clauses, Respondent does not dispute or distinguish the authorities cited by Nationwide that those grounds are essentially an

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review ends when the matter enters litigation and is transferred to defense counsel. In any event, the particular wrongs for which the punitive damages judgment was imposed occurred before suit was filed, approximately 3½ years before the Alabama Supreme Court decision in *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1 (Ala. 1981). Respondent's implication that Nationwide somehow had warning that its conduct in 1978 was punishable by punitive damages under the then nonexistent tort of bad faith is simply unrealistic.

[5] *See, e.g., Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1983); *Chapman v. Rivers Constr. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy v. McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson v. Gaines*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd v. Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress v. Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So.2d 174 (1950); *Atlanta, Birmingham & Coast R. Co. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter v. Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent v. Foy*, 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co. v. Thombs*, 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co. v. Reese*, 201 Ala. 673, 79 So. 245 (1918).

enlargement of Nationwide's Constitutional argument of the same point. *See* Petition pp. 7-9.[6]

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CONCLUSION

A revealing argument in favor of granting certiorari is contained in Respondent's concluding remarks:

> "Furthermore, the challenge to Justice Embry's participation has at least some substance in *Aetna v. Lavoie,* where he authored the 5-4 decision." Response p. 17.

If the challenge to Justice Embry's participation "has at least some substance in *Aetna v. Lavoie,*" as Respondent concedes, that challenge necessarily has some substance here. The appropriate means for redressing the unconstitutional prejudice in *both* cases is to remand them both to the Supreme Court of Alabama with instructions to

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[6] In response to Nationwide's demonstration that Respondent's claim was at least partially debatable as a matter of law, Respondent contends that position was "rejected by the trial court, the jury, and the Alabama Supreme Court." Response p. 15 n.8. The record establishes, however, that the trial judge excluded a portion of Respondent's claim as a matter of law by directing a verdict on the contract claim for an amount less than Respondent sought. See Petition pp. 4, 15, 73a.

utilize established state procedure for a *de novo* retrial before a temporary court.

Respectfully submitted,

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